IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPLICATION NO. 3 OF 2005
IN
ELECTION PETITION NO. 3 OF 2004

Vivek Raghunath Pandit]
Aged 48 years, Indian Inhabitant]
Resident of 17, Fatima Sagar Shet Road]
Papadi, Tal: Vasai, District : Thane]Petitioner
versus
Hitendra Vishnu Thakur]
Adult, resident of Thakur Niwas,]Applicant
Raja Shivaji Marg, Virar, Tal: Vasai](original
Dist: Thane]Respondent

Mr. L. M. Acharya for the Petitioner.
Mr. S. G. Aney, Senior Counsel with Mr. S. Aole i/b. M/s. Udwadia & Udeshi for the Applicant / Original Respondent.

CORAM : D. G. DESHPANDE, J.
DATE : 12TH APRIL, 2007.

ORAL JUDGMENT : (IN CHAMBER) :

1. Heard learned Counsel for the Petitioner and the Applicant / Original Respondent.

2. This Application is taken out by the applicant / original respondent, which is in the form of objections to the maintainability of this petition, in the form in which it is presented to this Court. Many contentions are raised by the counsel for the Applicant / Original Respondent.

However, Mr. Aney, Senior Counsel, restricted himself to paragraph 4 of this Application, wherein he has raised objection under Section 82 of The Representation of the People Act, 1950 (for short "said Act"). However, he also drew my attention to the prayer clause (d) of the petition and provisions of Section 98 of the Act, and contended that since all those who contested election at the relevant time i.e. two persons named in paragraph 4 of his Application, viz. Mr. Sukhdev Jairam Khairnar and Ms. Jayashree Uday Samant, have not been joined in this election petition, the petition is liable to be dismissed, and, there is no option left.

3. On the other hand, counsel for the petitioner contended that prayer clause (d) of the petition is a residuary prayer or a consequential prayer but in the main petition the petitioner has not created any ground for granting any relief to him that if the election of the respondent is declared void, he should be declared elected. He therefore contended that the objection raised by the applicant / original respondent is based on misreading of the provisions of Sections 82, 86, 98 and 99 of the said Act.

4. Section 82 of the said Act, reads thus :

> "**82. Parties to the petition.-** *A petitioner shall join as respondents to his petition -*
>
> *(a) where the petitioner, in addition to claiming declaration that the election of all or any of the returned candidates is void, claims a further declaration that he himself or any other candidate has been duly elected, all the contesting candidates other than the petitioner, and where no such further declaration is claimed, all the returned candidates; and*
>
> *(b) any other candidate against whom allegations of any corrupt practice are made in the petition."*

Section 98 of the said Act, reads thus :

> "**98. Decision of [the High Court].-** *At the conclusion of the trial of an election petition [the High Court] shall make an order -*
>
> *(a) dismissing the election petition; or*
>
> *(b) declaring the election of [all or any of the returned candidates] to be void; or*
>
> *(c) declaring the election of [all or any of the returned candidates] to be void and the petitioner or any other candidate to have been duly elected.*

5. Prayer clause (d) of the petition, reads as follows:

> **"[d] any other order or relief as this Hon'ble Court deems fit and proper as contemplated under sections 98 and 99 of the said Act be passed in the facts and circumstances of the present case."**

6. Section 98 of the said Act, as stated above, gives powers to the High Court to make orders of three types at the time of conclusion of the trial. Firstly, the High Court can dismiss the petition, secondly, High Court can declare election to be void and, thirdly, after giving such declaration, the High Court can declare that the petitioner or any other candidate has been duly elected.

7. It is pertinent to note that there is specific prayer (a) in paragraph 16 of the petition that the election of the first Respondent be declared as null and void. If therefore the prayer for declaring the election as null and void is specifically made in prayer (a) of paragraph 16 consistent with the provisions of Section 98, then what remains in Section 98 is the declaration that the petitioner is required to be declared elected.

8. Even if the statement of the counsel for the petitioner is accepted that the petitioner has not created any background for grant of such relief i.e. he being declared elected in his petition, the fact remains that the pleadings are always at the

discretion of the party. Whether they want to plead a particular thing or not is their choice. But when the relief is specifically claimed in prayer clause (d) and since prayer (d) is a consequential relief of declaring the election of the petitioner void. This is a clear case where the petitioner has claimed that he be declared elected.

9. It is true that in prayer (a) there is a reference to Sections 100(1)(b), 100(1)(d)(ii) and 100(1)(d)(iv) of the said Act, but that is with reference to ground for declaring the election void. It is altogether different whether the petitioner wants that the election be declared void on a particular ground or not. But the powers of the High Court to declare the election void are regulated by Section 98 only. The grounds, apart from the power is only in Section 98 and no other section. Therefore, when Section 82 lays down that where the petitioner is claiming declaration that he be declared elected, he has to join all those respondents who contested the election. My attention was also drawn by Mr. Aney, Counsel for the Applicant / original Respondent to Section 86 of the said Act, which specifically, clearly and in

unequivocal terms provide that if the petition does not comply with the provisions of Section 81, or Section 82, the High Court shall dismiss it. Both the Advocates agree on the legal position of this matter i.e. if there is no compliance to Sections 81, 82 or 117 of the said Act, the High Court is bound to dismiss the petition.

10. In view of this legal position when the petitioner has in prayer (d) claimed relief under Section 98 and the only relief he could have claimed under Section 98 after making specific prayer in prayer (a) is for declaration that he is elected, in that case it was obligatory upon him to join all the contested candidates as respondents. Admittedly, this is not done and therefore the objection raised by the Applicant / Original Respondent is required to be upheld and accepted.

11. In the result, Application No.3 of 2005 filed by the Applicant / Original Respondent is allowed and disposed of. Consequently, the petition fails and is dismissed. In view of the dismissal of the Petition, Application (Lodging) No. 4 of 2005 does not survive, and stands disposed of. The cost

deposited by the petitioner at the time of presenting this petition, shall be paid to the Respondent. Certified copy expedited.

(D.G. DESHPANDE, J.)